1954

Carlos Johnson v. S. M. Covey : Petition for Rehearing

Utah Supreme Court

Richards and Bird; Attorneys for Appellants;

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

CARLOS JOHNSON,

Respondent,

— vs. —

S. M. COVEY,

Appellant.

Case No. 7988

PETITION FOR RE-HEARING

RICHARDS AND BIRD
Attorneys for Appellants

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

CARLOS JOHNSON,

Respondent,

— vs. —

S. M. COVEY,

Appellant.

Case No. 7988

PETITION FOR RE-HEARING

To attorneys not participating in an appeal, terse decisions have a certain satisfaction and are mildly humorous. If the Supreme Court can dispose of a contested appeal in a half page decision, the attorneys for the appellant should have been smart enough to foresee the simpli-

city of the questions and the ease with which the court would dispose of the appeal. Hence, other attorneys are mildly amused that counsel get so wrapped up in their view of the case that they cannot appreciate its insignificance.

A terse disposition of a case on appeal suggests three alternatives:

(1) The amount involved is so small as not to be worth the court's attention.

(2) The questions involved are so obvious as not to require discussion.

(3) The court has misconceived the basis of the appeal.

As to the first point and its application to the case at hand, there may be some merit, since the appeal involves some $1,700.00. This, however, is a question for the legislature and up to now with cases arising in the District Court the right of appeal has not been limited.

(2) The case may be so simple as to present no reasonable doubt. It was obviously on this basis that the court disposed of the cause as it cited only two cases, the principles of both of which are conceded by appellants in the briefs, are conceded now and were conceded in the District Court.

The court says, "there was sufficient evidence in the record to support such conclusion under familiar principles enunciated by this court," the conclusion being that the plaintiff and respondent "owned the pipe purchased

with his money." The court cites *Toomer's Estate v. Union Pacific Railroad,* 239 Pac. 2d, 163. At page 165 this court said, "The jury, having found the issues in favor of the plaintiff, he is entitled to have us consider all of the evidence, and every inference and intendment fairly arising therefrom in the light most favorable to him." With this statement of the law there is no quarrel. The question appellant raised was whether there was any competent or credible evidence to support the trial court.

On the second question in the case involving confusion of goods, the court cites *Manti City Savings Bank v. Peterson,* 33 Utah 209, 93 Pac. 566, which holds that where leased sheep are intermingled with sheep of the lessee and are not capable of identification the lessor and lessee become tenants in common. There is no dispute as to this statement of the law. The question raised by the appeal was, assuming the intermingling of personal property so as to result in a confusion of goods or tenancy in common, what right does one of the parties have to divide the property and control his own share, leaving the other party to worry about his own? The opinion doesn't even recognize this question. *Manti Bank v. Peterson* holds an owner has the right of replevin, where all preliminaries are met, and does not charge the segregator with responsibility for the balance.

(3) The court has misconceived the basis of the appeal. The Constitution of the State of Utah does not require elaborate opinions from the Supreme Court but says in Article VIII, Section 25, that "the reasons therefor shall be stated concisely in writing * * *."

If the Supreme Court has followed this constitutional exhortation then it has not decided the case presented by appellant, because its reasons do not deal with either of the questions raised on the appeal.

It is our view that appellant is entitled to a decision on whether the evidence in behalf of the plaintiff is credible and probative, or whether, as contended by the appellant, it was composed entirely of gratuitous and incompetent statements of ultimate fact, shown by the evidence of the respondent himself to have been based upon surmise and wishfulness, the statement being completely destroyed by the foundation evidence in the case. We are not so wasteful of client's money and our reputation that we would appeal a case on a question of fact with conflicting, competent evidence. We believe we are entitled also to a decision as to the rights of a person whose personal property has become confused with that of others, and not simply a statement that where goods have been confused each of the contributors owns a fractional part thereof, and that proceeds from a sale shall be divided proportionately. That is only the beginning of the problem. Realizing that this is the law generally, is it not also the law in Utah that an owner of intermingled and confused goods has the right to make a segregation, controlling his own property and ignoring the balance?

If the court in a terse decision would state its answers to these two questions, at least the law would be made plain. Counsel for a litigant are entitled to rely

on decided cases in advising their clients, and are entitled to assume that this court will state that they have misconceived the law, that the facts do not support their contention, or that new law is being established.

Does the court mean to hold, that where two owners of drill pipe have intermingled their indistinguishable pieces of pipe, the only remedy either one has is to sell all or a part of the pipe and hold the proceeds in the same proportion as the original pile of pipe? Does the court mean to suggest that the appellant had no right to go to Vernal, Utah, and take possession of his proper share of the intermingled pipe, leaving the rest where it was? Or does the court hold in its decision that appellant is to be punished because in segregating the pipe he mistakenly took more than his proper share? Our view of the facts and the law is that if appellant had segregated only his proper share the respondent would have received nothing and could not complain because of his own negligence. Appellant's mistake in segregating more than his proper share has actually benefitted the respondent, because the surplus is available to respondent.

The court sustains the finding that respondent owned 25.17% of the confused mass. That means appellant owned 74.83% of the pipe piled in the rig after the well was abandoned. The trial court found there was 5,890 feet of good pipe worth $1.50 per foot. Of this appellant owned 74.83%, or the equivalent of 4,407.5 feet, worth $6,611.25.

When the rig was being sold and dismantled appel-

lant wanted to protect and did protect his share of the pipe, as he had a right to do. (Cases cited by appellant in his Brief, pp. 35-38.) This share was as specified, and any amount segregated in addition to his share was the pipe of respondent. The tenancy in common was terminated and all of appellant's share was in the pile segregated. The pipe left in the rig was respondent's alone and the loss of it was respondent's loss.

Therefore the proceeds of sale of the segregated pipe belonged $6,611.25 to appellant, and the balance to respondent, after making proportionate reductions for the cost of keeping and expenses of sale. Appellant's share was 661125 ths, or 83.4%. Costs of sale and storage of $815.00 (paid by appellant) should be apportioned accordingly. 16.6% of that amount or $135.29 is chargeable to respondent. Therefore, assuming the good pipe to be only in the amount found by the trial court, respondent should be allowed a maximum of $1,173.83, and appellant should retain the remainder.

The law seems to us to be definite that partial owners of confused goods have the right of segregation, including the right to accomplish the segregation by replevin action. Assuming this right, there is no authority cited by the court or by the respondent that a party acting in good faith will be penalized because he took more than his share. The cases properly hold that only the surplus portion is held for the benefit of the other party.

We cannot compel a re-hearing, but submit that the court has not decided the questions presented by the record on appeal.

As to the other point raised by the record, namely, "Who owned the pipe?", the court might very well be tempted to say, there is no evidence that appellant owned the pipe and appellant therefore cannot complain if the true owner failed to come forth and establish his ownership. Or the court might conceivably say, the evidence supporting respondent would not be sufficient to establish ownership against M. E. Baird or Baird and Robbins Company, but as against appellant the court is not disposed to be too fussy. Such an attitude might not satisfy appellant, but at least it would lay the matter at rest. The inappropriate statement of the court in this case simply indicates that this court is not concerned with the difference between credible and probative evidence and evidence which is known by the witness to be false and without foundation, and right in the teeth of the basic facts in the case which establish ownership of the pipe in Baird and Robbins Drilling Company. The name of Johnson was never used in the purchase of the pipe, and Johnson's loan of money to Baird and Robbins was definitely and finally resolved in a promissory note with a security guarantee, which is Exhibit "C", and which establishes Baird and Robbins as the owner of the pipe in a document produced by respondent from his own possession and submitted as the controlling document in the case.

This is the question on ownership: A loaned $2,-500.00 to B to enable B to buy drill pipe. B purchased the pipe in his own name (under a rental or purchase

option) and proceeded to use it. B later agreed in writing to repay A $2,800.00 and to keep the pipe on the premises until the loan is repaid. B went broke and abandoned the premises, leaving the drill pipe in place. Does A own the pipe? If the court thinks so, it should say so, and not duck the question by saying the evidence is conflicting. For A to testify, with the above the admitted facts, that he owns the pipe, cannot be evidence of ownership but only a layman's claim of ownership. But if the court accepts such a self-serving claim as evidence why should it not say so? That would be establishing law.

Appellant suggests that he is entitled to have the court decide the case on the facts and law presented, and not be shrugged off with an opinion which does not even recognize the questions raised by the appeal.

Respectfully submitted,

RICHARDS AND BIRD
Attorneys for Appellants